Petition

81-812

Office - Supreme Court, U.S.
FILED
OCT 30 1981
ALEXANDER L. STEVAS,
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

GEORGE E. WALKER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a defendant is charged with conspiring to defraud the government by falsely certifying he has not colluded with potential competitors to obtain the award of Forest Service timber sale contracts, does the conspiracy continue for statute of limitations purposes through defendant's performance of the contracts and division of profits with his co-conspirators?

TABLE OF CONTENTS

OPINION BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT

(1) The Ninth Circuit opinion has decided a federal question in a way in conflict with applicable decisions of this Court 8

(2) The Court of Appeals' opinion conflicts with the decision of another court of appeals on the same question 18

(3) Certiorari should be granted to clarify the construction of the conspiracy to defraud statute, 18 U.S.C. §371 21

CONCLUSION 25

TABLE OF AUTHORITIES

CASES — Page

Atkinson v. United States, 307 F.2d 937, 940 (9th Cir. 1962) 9

Bridges v. United States, 346 U.S. 209, 224 (1952) 22

Carroll v. United States,
326 F.2d 72, 85-86
(9th Cir. 1963) 20

Dennis v. United States,
384 U.S. 855, 860 (1966) 21, 22

Fiswick v. United States,
329 U.S. 211 (1946) 14, 15, 18

Grunewald v. United States,
353 U.S. 391 (1957)
..... 10, 16,17, 18, 22

Houston v. United States,
217 F. 852 (9th Cir. 1914) 10

Koury v. United States,
217 F.2d 387, 388
(6th Cir. 1954) 9

McDonald v. United States,
89 F.2d 128 (8th Cir. 1937) 10

Screws v. United States,
325 U.S. 91, 105 (1945). 25

State ex Rel. Whitman v. Fox,
236 SE2d 565, 568-71 (1977) 24

Toussie v. United States,
397 U.S. 112 (1970)
..... 11, 12, 13, 18, 20

United States v. Habig,
390 U.S. 222, 227 (1968). 10

United States v. Hare,
619 F.2d 1085 (1980) 19, 21

United States v. Hickey,
360 F.2d 127, 141
(7th Cir. 1966) 9

United States v. Inryco, Inc. et al.,
9th Cir. No. 80-1326 21

United States v. James,
494 F.2d 1007, 1026
(D.C. Cir. 1974) 9

United States v. Kissel,
218 U.S. 601 (1910) .. 10, 14, 15, 18

United States v. Rosenblatt,
554 F.2d 36, 40 (2d Cir. 1977)
..... 22, 23, 24

Wood v. Carpenter,
101 U.S. 135, 139 (1879) 14

SECONDARY AUTHORITIES

"Conspiracy to Defraud the United States," 68 Yale L.J. 405 (1959)..... 22

STATUTES

United States Code

15 U.S.C. §1..... 3

18 U.S.C. §201(g).....19

18 U.S.C. §371.....2,3,11,21

18 U.S.C. §1341.....3

18 U.S.C. §3282.....2,11

28 U.S.C. §1254.....2

Appendix A

Memorandum, United States Court of Appeals for the Ninth Circuit 1

Appendix B

Order, United States Court of Appeals for the Ninth Circuit 1

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

GEORGE E. WALKER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner George E. Walker prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on August 17, 1981, which affirmed the order of the United States District Court for the District of Oregon.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is officially reported at 653 F.2d 1343. A copy is attached

hereto as Appendix A.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1254. Petitioner's appeal was decided by the Ninth Circuit Court of Appeals on August 17, 1981. A petition for rehearing and suggestion for rehearing en banc were denied October 15, 1981. Appendix B.

STATUTORY PROVISIONS

The statute of limitations applicable in this case is 18 U.S.C. §3282:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

The statute under which petitioner was convicted is 18 U.S.C. §371, which provides, in relevant part:

> If two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy [each shall be punished as provided].

STATEMENT OF THE CASE

Mr. Walker was indicted in the District of Oregon, with his co-defendant James Smejkal, for conspiracy in restraint of trade (15 U.S.C. §1) and conspiracy to defraud the government (18 U.S.C. §371).[1] The jury acquitted Mr. Walker of conspiring to restrain trade by colluding in the bidding for two Forest Service timber sales. It convicted him, however, of conspiring to defraud the government by stating in required bid

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1. A third count, charging Mr. Walker alone with mail fraud under 18 U.S.C. §1341 was dismissed by the Government at sentencing.

forms that he had not colluded.[2]

Mr. Walker moved in the District Court to dismiss the indictment, for judgment of acquittal and in arrest of judgment, relying on the five year statute of limitations. The timber sales on which he was charged with colluding were bid June 23, 1972. The indictment was filed January 25, 1979, some six and one-half years later. Each of these motions was denied by the District Court, and the Ninth Circuit Court of Appeals affirmed.

The facts are appropriately stated in the Court of Appeals' opinion:

> On June 23, 1972, the Forest Service opened sealed bids from six companies or individuals on the timber to be

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2. Mr. Walker argued in the Court of Appeals that the indictment was multiplicitous and that the jury's inconsistent verdict showed he had been prejudiced by this multiplicity. He does not pursue that contention here.

cut from two tracts of land in Oregon. The bidders were Walker; the Murphy Company [Murphy], for whom Walker's co-defendant Smejkal acted as an agent; Coos Head Timber Company [Coos Head]; West Coast Orient Company [W.C.O.]; and two other companies not involved in this case. Each bid was accompanied by a Certificate of Independent Price Determination. All the written bids but Walker's were for the minimum acceptable price set by the Forest Service and no oral bids were offered at the auction. Therefore, Walker's offer of five cents per thousand board feet over the minimum was successful. The Government contended that Walker rigged bids with three other bidders - Smejkal, Coos Head, and W.C.O. - and two who regularly bid for Port Orford cedar but did not bid on the Sucker Creek and Tellim sales - Matthews and Ocean Terminals Company [O.T.]. Its contention was backed up by circumstantial evidence offered at trial of payments to these five companies and individuals, allegedly payoffs for their presale agreement with Walker that his would be the only bid over the minimum, thus forcing the Forest Service to sell the timber at an artificially deflated price.

The day after the sale Walker and Matthews entered into a joint-venture agreement to share all profits and costs of the two sales, but Walker failed to honor the

agreement, instead sharing profits with Smejkal and selling all the Port Orford cedar to W.C.O. for resale to Japan. Walker's and Smejkal's profit-sharing agreement on the sales was dated three days before the actual sale. Walker had W.C.O. pay Murphy - the money actually went to Murphy's agent, Smejkal - $25 per thousand board feet cut on the two tracts, for a total of $100,000, as shown on Walker's statements to W.C.O. Matthews testified that Walker told him the payments were to keep Murphy from bidding on the two sales. Walker sold the Douglas fir to Coos Head for $90 per thousand board feet, $40 under its $130 market value. A W.C.O., official testified Walker said this procedure saved him from having to write checks to Coos Head for the $40 amount. Walker insisted that W.C.O. use O.T. for loading and storing the logs W.C.O. bought from him, even though O.T.'s charge was $23.50 per thousand board feet and W.C.O's usual log handler only charged $12.50. W.C.O. only agreed to do so on condition that the excess payments be subtracted from the sale price W.C.O. paid to Walker.

Footnote four of the Court of Appeals' opinion contains a reasonable summary of Mr. Walker's factual defenses:

4. Walker had several defenses to the inference of bid-rigging from these acts: He was known as an aggressive bidder likely to outbid his competitors. None of his competitors except O.T. was a regular exporter of Port Orford cedar and in a position to bid on two tracts this size. O.T. lacked the necessary Japanese backing for such a substantial amount of cedar. The profit-sharing agreement with Smejkal, they both claimed, was actually signed in July after the sale and backdated for tax purposes. The payments to Smejkal were Walker's part of a joint land purchase by Smejkal and Walker. Coos Head did not pay less than the market value because the average price for Douglas fir in mid-1972 and the highest Coos Head would have paid was $90. O.T.'s high charge for log-handling was necessitated by extraordinary services and, even at that price O.T. could not make a profit and discontinued handling logs from the two sales in 1974. W.C.O. sold Walker the cedar [sic, "bought the cedar from Walker"] because W.C.O. had always been Walker's backer for Port Orford cedar sales. Matthews' testimony was motivated by antagonism at being displaced by Smejkal as Walker's partner in the venture. Walker claimed he was considered highly generous and felt it made good business sense to share his good fortune in making such an excellent buy on the two sales with his competitors.

The Court of Appeals agreed with the Government that the conspiracy did not end when Mr. Walker was awarded the timber sale contracts in June of 1972 but rather continued as he logged timber under the contracts and paid part of the profits to the alleged co-conspirators.

REASONS FOR GRANTING THE WRIT

(1) The Ninth Circuit opinion has decided a federal question in a way in conflict with applicable decisions of this Court.

Because the indictment in this case was brought six and one-half years after the bidding of the Tellim and Sucker Creek timber sales, the Government was constrained to argue that the conspiracy to defraud the Government by impairing its competitive bidding process did not end with the bidding of the timber sales but continued as the timber was logged and profits from its sale shared with the

co-conspirators. The legal question presented by Mr. Walker's Ninth Circuit appeal was simply whether, for statute of limitations purposes, the conspiracy continued through Mr. Walker's performance of his contract to purchase the timber and the sharing of profits with his alleged co-conspirators.

The Ninth Circuit's opinion relies on numerous cases which discuss the continuance of conspiracies for purposes of admitting co-conspirators' statements in evidence or tying additional defendants to conspiracies.[3] These are

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3. Atkinson v. United States, 307 F.2d 937, 940 (9th Cir. 1962) (admissibility of statements); United States v. James, 494 F.2d 1007, 1026 (D.C. Cir. 1974) (same); United States v. Hickey, 360 F.2d 127, 141 (7th Cir. 1966) (admissibility of lulling payments); Koury v. United States, 217 F.2d 387, 388 (6th Cir. 1954) (admissibility of evidence);

not statute of limitations cases. The Court's reliance on these cases demonstrates its failure to take account of the crucial and often-stated policy considerations which attend the statute of limitations.

It is fundamental that statutes of limitations are to be liberally construed in favor of repose. United States v. Habig, 390 U.S. 222, 227 (1968). This Court stated clearly the rule for continuing crimes in statute of

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McDonald v. United States, 89 F.2d 128 (8th Cir. 1937) (connection of co-defendant to conspiracy).

The only case arguably in point is Houston v. United States, 217 F. 852 (9th Cir. 1914), an aged case devoid of reasoning, in which the statute of limitations was extended by one month, not three years as in this case. Mr. Walker believes Houston misinterprets this Court's opinion in United States v. Kissel, 218 U.S. 601 (1910) and is inconsistent with Grunewald v. United States, 353 U.S. 391 (1946).

limitations cases in Toussie v. United States, 397 U.S. 112 (1970):

> Congress has declared a policy that the statute of limitations should not be extended "[e]xcept as otherwise expressly provided by law." 18 U.S.C. §3282. These principles indicate that the doctrine of continuing offenses should be applied in only limited circumstances since, as the Court of Appeals correctly observed in this case, "[t]he tension between the purpose of a statute of limitations and the continuing offense doctrine is apparent; the latter, for all practical purposes, extends the statute beyond its stated term. These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

Id. at 115 (emphasis added) (citation omitted). Neither the government nor the Ninth Circuit's opinion points to anything in 18 U.S.C. §371 or its legislative history which can "compel"

the conclusion that the conspiracy alleged in this case should be held to have continued through the performance of the timber sale contract and division of profits.[4]

Indeed, to the contrary, the reasoning of the Court of Appeals ignored the principle of Toussie entirely. Statutes of limitations have several purposes, all of which have thus far been defeated in this case. They are designed to protect defendants from having to defend against charges "when the basic facts have become obscured by the passage

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4. There was no dispute whatever at trial concerning the contract performance and profit division on which the government relied to extend the conspiracy. All of the proof and all of the controversy centered on the events of June 23, 1972 and before. The trial in September, 1979 thus consisted of witnesses testifying as to meetings and conversations at least seven years old.

of time...". Toussie at 114. The only disputed events, and all of those "basic" to the prosecution, occurred more than seven years before trial. Limitation statutes are meant to "minimize the danger of official punishment because of acts in the far-distant past." Id. at 114-15. It is not the later acts of contract performance for which Mr. Walker stands to be punished but the alleged collusion of 1972. Any punishment would likely be imposed nine or ten years after the event.

> Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate criminal activity

Id. at 115. The Antitrust Division learned of allegations concerning collusion in this case in November, 1976. It called a witness before the grand jury in December, 1976 and did not

call another of the 52 eventually called, until March 1, 1978.

Futher, statutes of limitations apply especially in competitive business settings. The "security and stability [in] human affairs," Wood v. Carpenter, 101 U.S. 135, 139 (1879), furthered by the statute means more in the business context then just the defendant's right eventually to enjoy peace of mind. The ultimate repose of criminal liability is required if competitors such as Mr. Walker are to continue to function as market forces.

Throughout this case, Mr. Walker has relied on United States v. Kissel, 218 U.S. 601 (1910) and Fiswick v. United States, 329 U.S. 211 (1946) for the proposition that a conspiracy continues for statute of limitations purposes only when:

> [t]he plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, . . .

Kissel, 218 U.S. at 607.

> Though the result of a conspiracy may be continuing the conspiracy does not thereby become a continuing one . . . Continuity of action to produce the unlawful result, or . . . "continuous cooperation of the conspirators to keep it up," is necessary.

Fiswick, 329 U.S. at 216, quoting Kissel at 607.[5]

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5. There was simply no evidence that any cooperation among the alleged co-conspirators was necessary in order to defraud the Government after Mr. Walker had been awarded the two timber sales in June, 1972. The logging of the timber sales was done by Mr. Walker without help from the alleged co-conspirators.

   The Court of Appeals' opinion found continuing cooperation was necessary among the conspirators because had Walker failed to make an agreed pay-off, a material element of the agreement with the conspirators would have been breached. (footnote continued)

The Court of Appeals found payments to co-conspirators were necessary to the conspiracy in that they preserved the secrecy of the conspiracy. This runs squarely counter to this Court's opinion in Grunewald v. United States, 353 U.S. 391 (1957), which the Court of Appeals also misinterprets.

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653 F.2d at 1347-48. From this the opinion infers that a failure to make pay-offs would have caused the underpaid co-conspirator to reveal the conspiracy to the government, after which the Government would have rescinded the timber sale contract. First, there was no evidence that an underpaid co-conspirator would have gone to the Government. Since the indictment was returned January 25, 1979, only payments after January 25, 1974 could be relevant in this manner. Large quantities of timber from the Tellim and Sucker Creek sales having been logged in 1973, a conspirator whose payments stopped after January 25, 1974 would already have received tens of thousands of dollars. The likelihood of his informing at this point, risking criminal prosecution and loss of profits, would be slight indeed.

Grunewald held that a conspiracy to obtain "no prosecution" rulings from the Internal Revenue Service would not be continued for statute of limitations purposes by steps taken to conceal the conspiracy:

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the main criminal objective of the conspiracy, and acts of concealment done after these central objectives have been obtained, for the purpose only of covering up after the crime.

Grunewald, 353 U.S. at 405 (emphasis in original). Mr. Walker's contention is that, just as secrecy is present in every conspiracy, so is the division of profits among conspirators. Profit division in this case can therefore no more extend this conspiracy than could the attempts to cover the traces of the Grunewald conspiracy. This is especially true if,

as described in the Court of Appeals' opinion, the utility of profit division here was in its tendency to keep co-conspirators happy, therefore quiet.

The Tellim and Sucker Creek timber sales would have been logged at the price established June 23, 1972 whether the co-conspirators had continued to cooperate or not. No act done after June 23, 1972 was, under the relevant Supreme Court authorities, done in furtherance of the main criminal objective of the conspiracy. Certiorari should be granted to correct the Ninth Circuit's misinterpretation of Toussie, Kissel, Fiswick and Grunewald.

(2) The Court of Appeals' opinion conflicts with the decision of another court of appeals on the same question.

The opinion below conflicts with the

Fourth Circuit Court of Appeals' opinion in United States v. Hare, 619 F.2d 1085 (1980). In that case, defendant Internal Revenue Agent received an $11,000 loan with favorable interest and payment provisions, an act prohibited by 18 U.S.C. §201(g). He received the loan outside the statute of limitations and made payments of principal and interest at the favorable rates within the statute. The Fourth Circuit noted that Hare obtained contractual rights for liberal payment and interest when he got the loan and that his payment of the loan thereafter was the mere result of the beneficial contract terms. Id. at 1086. The same is true of Mr. Walker in this case. He obtained the Forest Service contracts in June, 1972. The rest was simply contract performance. The Hare court also addressed the implications of

the government's theory, implications present also in this case:

> If the Government's argument were accepted, the term of the loan would determine the application of the statute of limitations. For example, a twenty-five year loan would permit prosecution under §201(g) thirty years after the terms of the loan had been fixed and the loan proceeds had been received by the errant public official. Such a result would be contrary to the Supreme Court's admonition in Toussie v. United States, that federal statutes of limitations should be applied strictly in order to further the congressional policy favoring repose.

Id. at 1086-87, citing Carroll v. United States, 326 F.2d 72, 85-86 (9th Cir. 1963) (citation omitted). Similarly, in this case, Mr. Walker's susceptibility to prosecution would be determined, under the government's theory, by the termination date of the Forest Service cutting contract, a result Congress could not have intended.[6]

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6. The Ninth Circuit has recently denied a petition for rehearing in a

Certiorari should be granted to resolve the conflict between the opinion below and the Fourth Circuit opinion in Hare.

(3) Certiorari should be granted to clarify the construction of the conspiracy to defraud statute, 18 U.S.C. §371.

This Court and others have repeatedly warned of the dangers inherent in a broadly construed criminal statute prohibiting conspiracy to defraud. E.g. Dennis v. United States, 384 U.S. 855,

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case very similar to Mr. Walker's, United States v. Inryco, Inc. et al., 9th Cir. No. 80-1326. In Inryco, the trial court dismissed an antitrust conspiracy indictment, holding that profit-sharing under a contract obtained by collusion did not extend the conspiracy for statute of limitations purposes. The Ninth Circuit reversed. Petitioners in that case are filing a petition for a writ of certiorari.

860 (1966) (Section 371 may not be used as a "'cloak' the sole purpose of which [is] to revive a stale prosecution."); Bridges v. United States, 346 U.S. 209, 224 (1952). The Second Circuit Court of Appeals, in United States v. Rosenblatt, 554 F.2d 36, 40 (2d Cir. 1977) summarized this Court's concerns as follows:[7]

> When the government proceeds under the conspiracy-to-defraud clause, in cases that could as easily have been brought under the 'offense' clause, the courts must be alert to subtle 'attempts to broaden the already pervasive and wide sweeping nets of conspiracy prosecution.' Grunewald v. United States, 353 U.S. 391, 404, 77 S.Ct. 963, 974, 1 L.Ed.2d 931 (1957). The terms 'conspiracy' and 'defraud', when used together have a 'peculiar susceptibility to a kind of

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7. The classic treatment of the historical and policy bases for the required careful scrutiny of the fraud conspiracy prosecutions appears in Professor Goldstein's article, "Conspiracy to Defraud the United States," 68 Yale L.J. 405 (1959), referred to by this Court in Dennis, supra, 384 U.S. at 861.

> tactical manipulation which shields from view very real infringements on basic values of criminal law.' Goldstein 409. Accordingly, conspiracy-to-defraud prosecutions are 'scrutinized carefully.'

The problem created by the government's use of Section 371 in this case is specifically addressed in Rosenblatt:

> The potential for abuse in allowing the government to manipulate a prosecution by easy access to the conspiracy-to-defraud clause is clear . . . Since the number of overt acts would appear to increase along with the scope of the conspiracy, the period of the statute of limitations seems to lengthen. . . .

Id. at 41, n. 6. It is precisely because of the ill-defined limits of conspiracy to defraud that the Court of Appeals was led in this case to hold that ordinary contract performance on the Tellim and Sucker Creek timber sales was in furtherance of the alleged conspiracy. 653 F.2d at 1350. Had the government

charged simply an antitrust conspiracy to collude on the bidding for the sales, the Ninth Circuit reasoning would have required acquittal. Id. Thus, the government's tactical use of Section 371 allowed it to reach a different result with respect to the same factual circumstance. This is just what Rosenblatt rejects. 554 F.2d at 41.

Mr. Walker does not ask that Section 371 be held unconstitutional for vagueness.[8] He does point out that this case, in which witnesses testified at trial (or tried to) concerning events and conversations over seven years old, demonstrates the necessity of construing the fraud conspiracy statute narrowly so

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8. We note that this was done with respect to a similar statute by the Supreme Court of Appeals of West Virginia in State ex Rel. Whitman v. Fox, 236 SE2d 565, 568-71 (1977).

that it may not be used to broaden statutory offenses in violation of constitutional principles. Goldstein, supra at 443; Screws v. United States, 325 U.S. 91, 105 (1945). The holding below cannot be squared with the liberal construction of the statute of limitations and the strict construction of Section 371.

CONCLUSION

For the reasons stated, the writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit reversed.

Respectfully Submitted,

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Attorneys for Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, vs. GEORGE E. WALKER, Defendant/Appellant.	)	No. 79-1738
	)	MEMORANDUM

Appeal from the United States District Court for the District of Oregon

Before: ALARCON and CANBY, Circuit Judges, and HOFFMAN,* District Judge

WALTER E. HOFFMAN, District Judge:

Defendant appeals from a jury conviction for conspiring to defraud the United States by bid-rigging a timber sale by the United States Forest Service in violation of 18 U.S.C. § 371. The same jury acquitted him of a Sherman Act

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* Honorable Walter E. Hoffman, Senior Judge, United States District for the Eastern District of Virginia, sitting by designation.

§ 1 antitrust charge of conspiring to restrain trade in violation of 15 U.S.C. § 1 as to the same timber sales.[1] He was sentenced to a term of two years, but only required to serve 90 days and pay a $10,000 fine, with a five-year probationary period to follow his confinement.

Walker first argues that the indictment, which was returned on January 24, 1979, was barred [by] the applicable statute of limitations[2] as having been returned more than five years after the commission of the offense. He claims the defrauding offense was committed when he filed a false certificate that no bid-rigging had taken place in connection with his bid on the two timber sales in

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1. A co-defendant, Smejkal, was acquitted of both charges.

2. 18 U.S.C. § 3282

June, 1972. The conspiracy ended, he claims, when the Forest Service awarded Walker the two contracts in reliance upon the false representations in the certificates. The Government, on the other hand, sees the conspiratorial offense as being extended each time Walker cut timber, which was only finished in August and September, 1975, and paid off his co-conspirators, some of which payoffs occurred well within the five-year period. The second error Walker cites is unfair prejudice at trial as a result of alleged multiplicity in the conspiracy indictment. He contends that two conspiracies may not be alleged where only one agreement is involved, albeit to violate two distinct statutes. The Government answers that Walker cannot protest prejudice from multiplicity unless convicted on both counts and

thereafter given cumulative sentences, and that, even if he could, the two conspiracy charges neither amounted to prosecutorial abuse nor were multiplicious where two specific conspiracy statutes were violated. We agree with the Government on both issues and uphold Walker's conviction based on our conclusion that the defrauding charge was not time-barred and that the indictment was not multiplicious.

On June 23, 1972, the Forest Service opened sealed bids from six companies or individuals on the timber to be cut from two tracts of land in Oregon. The bidders were Walker; the Murphy Company [Murphy], for whom Walker's co-defendant Smejkal acted as an agent; Coos Head Timber Company [Coos Head]; West Coast Orient Company [W.C.O.]; and two other companies not involved in this case.

Each bid was accompanied by a Certificate of Independent Price Determination. All the written bids except Walker's were for the minimum acceptable price set by the Forest Service, and no oral bids were offered at the auction. Therefore, Walker's offer of five cents per thousand board feet over the minimum was successful. The Government contended that Walker rigged bids with three other bidders - Smejkal, Coos Head, and W.C.O. - and two who regularly bid for Port Orford cedar[3] but did not bid on the Sucker Creek and Tellim sales - Matthews and Ocean Terminals Company [O.T.]. Its contention was backed up by circumstantial evidence

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3. Both tracts had unusually large quantities of Port Orford cedar, usually exported to Japan, and lesser amounts of Douglas fir.

offered at trial of payments to these five companies and individuals, allegedly payoffs for their presale agreement with Walker that his would be the only bid over the minimum, thus forcing the Forest Service to sell the timber at an artificially deflated price.

The day after the sale Walker and Matthews entered into a joint-venture agreement to share all profits and costs of the two sales, but Walker failed to honor the agreement, instead sharing profits with Smejkal and selling all the Port Orford cedar to W.C.O. for resale to Japan. Walker's and Smejkal's profit-sharing agreement on the sale was dated three days before the actual sale. Walker had W.C.O. pay Murphy - the money actually went to Murphy's agent, Smejkal - $25 per thousand board feet cut on the two tracts, for a total of $100,000, as

shown on Walker's statements to W.C.O. Matthews testified that Walker told him the payments were to keep Murphy from bidding on the two sales. Walker sold the Douglas fir to Coos Head for $90 per thousand board board feet, $40 under its $130 market value. A W.C.O. official testified Walker said this procedure saved him from having to write checks to Coos Head for the $40 amount. Walker insisted that W.C.O. use O.T. for loading and storing the logs W.C.O. bought from him, even though O.T.'s charge was $23.50 per thousand board feet and W.C.O's usual log handler only charged $12.50. W.C.O. only agreed to do so on condition that the excess payments be subtracted from the sale price W.C.O. paid to Walker.[4]

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4. Walker had several defenses to the inference of bid-rigging from these acts: He was known as an aggressive bidder likely to outbid his competitors.

STATUTE OF LIMITATIONS

The general rule on when time

None of his competitors except O.T. was a regular exporter of Port Orford cedar and in a position to bid on two tracts this size. O.T. lacked the necessary Japanese backing for such a substantial amount of cedar. The profit-sharing agreement with Smejkal, they both claimed, was actually signed in July after the sale and backdated for tax purposes. The payments to Smejkal were Walker's part of a joint land purchase by Smejkal and Walker. Coos Head did not pay less than the market value because the average price for Douglas fir in mid-1972 and the highest Coos Head would have paid was $90. O.T.'s high charge for log-handling was necessitated by extraordinary services and, even at that price O.T. could not make a profit and discontinued handling logs from the two sales in 1974. W.C.O. sold Walker the cedar because W.C.O. had always been Walker's backer for Port Orford cedar sales. Matthews' testimony was motivated by antagonism at being displaced by Smejkal as Walker's partner in the venture. Walker claimed he was considered highly generous and felt it made good business sense to snare his good fortune in making such an excellent buy on the two sales with his competitors.

limits begin to run on conspiracy charges was stated by the Supreme Court in Grunewald v. United States, 353 U.S. 391, 397, 77 S.Ct. 963, 970, 1 L.Ed.2d 931 (1957):

> [T]he crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy. (Emphasis supplied)

The scope of Walker's agreement with his co-conspirators must be inferred from the circumstantial evidence, there being no direct testimony as to what was agreed upon. From that evidence[5] a jury

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5. Circumstantial evidence included the profit-sharing agreement with and W.C.O.'s payments to Smejkal, the joint-venture agreement with Matthews, the sale of fir to Coos Head at less than market value, the excessively high log-handling payments to O.T., and the sale of the cedar to W.C.O.

could have concluded that one aim of the agreement was for Walker to repay each co-conspirator who agreed not to bid or to bid only the minimum, and, that being an aim of the conspiracy, that it lasted through the division of the excess profits Walker made on the sale among the co-conspirators.[6]

Walker argues that, as a matter of law, the essence of a conspiracy such as this one is the filing of a false statement to defeat a legitimate government function and thus his offense is not chargeable under § 371 as a conspiracy to defraud the United States,

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6. The duration of a conspiracy for purposes of the statute of limitations is a fact question for the jury. Koury v. United States, 217 F.2d 387, 388 (6th Cir. 1954). The jurors were told that Walker could only be found guilty of violating § 371 if they found the conspiracy continued after January 25, 1974.

which charge he calls a ploy to apply a longer statute of limitations. He sees the criminal objective here as accomplished with the award to Walker in reliance on the filing of false certificates with the Forest Service. He cites as authority Bridges v. United States, 346 U.S. 209, 73 S.Ct. 1055, 97 L.Ed. 1557 (1953), in which the Court held the defendants' crime to be the substantive one, time barred, of obstructing the proper administration of naturalization laws by making false statements, not that of conspiracy to defraud the government under the predecessor statute to § 371. "The use in Count I of language copied from the second [defrauding] clause of the conspiracy statute merely cloaks a factual charge of conspiring to cause, or knowingly to aid, Bridges to make a false

statement. . . .", id. at 224, 73 S.Ct. at 1063. Fraud was not "an essential ingredient of the offense of making a false material statement under oath in a naturalization proceeding," id. at 222, 73 S.Ct. at 1062 and thus Bridges could not be charged with defrauding the government in violation of § 371. In addition, the Wartime Suspension of Limitations Act that the government sought to apply to toll the time period for the indictment only applied "where the fraud [was] of a pecuniary nature or at least of a nature concerning property." Id. at 215, 73 S.Ct. at 1059.

The Court later explained its decision in Bridges as based on an unwillingness to allow prosecutorial sleight-of-hand. In Dennis v. United States, 384 U.S. 855, 863, 86 S.Ct. 1840, 1845, 16 L.Ed.2d 973 (1966), the Court

said, "The decision there [in Bridges] did not turn upon construction of § 371." The sole purpose of characterizing the charge in Bridges as a § 371 conspiracy to defraud was "to revive a stale prosecution" by use of the Wartime Act, which was only intended to suspend time limits on pecuniary fraud or fraud on property. Id. The defendants in Dennis, in contrast, who conspired to file false non-Communist affidavits with the National Labor Relations Board in order to be able to employ its services, were properly charged under § 371 with conspiracy to defraud the government, although they also could have been indicted for a § 371 conspiracy to violate 18 U.S.C. § 1001, forbidding the filing of false statements with a government agency. Id. at 863-64 n. 8, 86 S.Ct. at 1845-46 n. 8. Both charges

were applicable to defendants' conduct; the choice of a § 371 defrauding action was not an attempt to escape a time bar, as either action would have been timely as long as one overt act took place within the necessary time span. Id. As in Dennis, the fraud here involved a false statement to a government agency and the later enjoyment of the fruits of that deception and was properly charged as a § 371 fraud. Therefore, the last overt act of this conspiracy was not the filing of the false certificates, because the agreement itself aimed beyond merely defeating the government process of competitive bidding and encompassed the ultimate objective of making excess profits to be shared among the co-conspirators. This reading of the extension of Walker's conspiracy is buttressed by the decision in Bramblett

v. United States, 231 F.2d 489, 491 (D.C. Cir.), cert. denied, 350 U.S. 1015, 76 S.Ct. 658, 100 L.Ed. 874 (1956), in which the District of Columbia Circuit found a falsification scheme by a Congressman, charged under § 1001 forbidding false statements did not end with the filing of false payroll records, but instead continued through each payment by the government in reliance on those false records. Even Judge Bazelon's dissent acknowledged that, had the defendant been charged under the broader defrauding statute involved here, he would have viewed the conspiracy as a continuing one. Id. at 493.

Walker also argues that the conspiracy would be seen as ending with the award under a test set by this court that "'[the] statute of limitations starts to run on the date of the last

overt act alleged to have caused the complainant injury.'" United States v. Charnay, 537 F.2d 341, 354 (9th Cir.), cert. denied, 429 U.S. 1000, 97 S.Ct. 527, 50 L.Ed.2d 610 (1976). Under that test, the issue would be what was the last act that actually defrauded the United States. Walker sees it as the award to him at an artificially deflated price. We disagree. The injury, in our opinion, was not complete until Walker had cut the last timber, obtained title to it, paid the government a noncompetitive price for it, resold it at an excess profit, and split the excess with his co-conspirators. The very reason Walker was charged under the more all-encompassing defrauding statute, rather then for conspiracy to make false statement was that the injury went beyond the government's reliance on a false

statement. He defrauded the United States of a competitive price for its timber each time he took the later actions.

Walker also cites two other Supreme Court opinions stating that the life of a conspiracy is not prolonged by continuing cooperation of co-conspirators unless such is preplanned and necessary to the scheme's success.

> It is true that the unlawful agreement satisifies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. . . . But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, [the conspiracy continues].

United States v. Kissel, 218 U.S. 601, 607, 31 S.Ct. 124, 125, 54 L.Ed. 1168 (1910). (Conspiracy to eliminate

competitor by cooperative use of voting rights continued as long as those rights were exercised to drive competitor out of business). The Court elaborated on the same theme in Fiswick v. United States, 329 U.S. 211, 67 S.Ct. 224, 227, 91 L.Ed. 196 (1946):

> Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one. . . . Continuity of action to produce the unlawful result, or . . . "continuous cooperation of the conspirators to keep it up," is necessary.

Walker views the cutting, payment, resale, and division of profits on the timber as merely the continuing result of the conspiracy, but we believe the conspiracy was a continuing one within the meaning of Kissel and Fiswick. Without the continuing cooperation of his co-conspirators, bought by the payoffs to them in various forms, the scheme

would have fallen apart. There was enough evidence for a jury to conclude that the agreement not to outbid Walker included a promised share in his profits. Had Walker failed to make an agreed payoff, a material element of the agreement with the co-conspirators would have been breached.[7]

Walker next argues that the acts relied on to prolong the conspiracy - performance of his contract and division of the spoils - are analogous to acts of

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7. Had one of the co-conspirators informed the government of the bid-rigging, the government probably could have rescinded the contract. See United States v. 1,557.28 Acres of Land . . ., 486 F.2d 445, 447 (10th Cir. 1973)(District Court's rescission of offer to sell land to government upheld, where rescission was granted because of fraud by government's agent because under federal law, "[w]here a party can show that he has been fraudulently induced to enter into a transaction, he may then void that transaction.").

concealment, which do not ordinarily extend the life of a conspiracy. All three types of acts are similar, he says, as they follow almost every conspiracy to defraud the government and do not further the main objectives of the conspiracy. He relies on Grunewald v. United States, 353 U.S. 391, 405, 77 S.Ct. 963, 974, 1 L.Ed.2d 931 (1957), in which the Court refused to find a conspiracy to defraud the Internal Revenue Service by obtaining "no prosecution" rulings had been extended by later attempts to conceal the crime, which attempts had not formed part of a conspiratorial agreement.

> We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished.

> By no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the main criminal objective of the conspiracy, and acts of concealment done after these central objectives have been obtained, for the purpose only of covering up after the crime.

Id.

We do not agree with Walker that the acts of contract performance and division of profits are analogous to coverup activities and thus barred by Grunewald. However, even if we were to accept this tortured analogy and apply the Grunewald test, those acts formed part of the conspiracy because they did not follow the accomplishment of its central criminal objectives but rather were acts in furtherance of those aims, viz, obtaining and dividing the excess profits made on the timber. Walker's definition of the objective of the conspirators as

limited to obtaining the award from the Forest Service is far too narrow.

Walker primarily relies on three cases for his contention that dividing the spoils is not a major aim of such a conspiracy. None of them is persuasive. In United States v. Great Western Sugar Co., 39 F.2d 152, 154 (D. Neb. 1930), the conspiracy to restrain trade by closing the market to a potential competitor ended when farmers signed long-term contracts to sell sugar at a high price to defendant sugar refiner, thus ending the price war. However, both the statute and conspiracy were different in Great Western than here; once the contracts with the farmers were signed, the predatory pricing had accomplished its purpose of shutting out a potential competitor, which was at once the aim of the conspiracy and one of the major evils

at which Sherman § 1 was directed. In contrast, the goal of Walker's conspiracy, and one of the evils § 371 was designed to protect against, was defrauding the United States of money; that goal was not fully achieved until all the timber had been cut and the government paid at a noncompetitive price. The Eighth Circuit case cited by Walker is also inapposite. In Lonabaugh v. United States, 179 F. 476, 481 (8th Cir. 1910), the conspiracy to defraud the government was over when the government accepted applications for land patents that falsely stated the applicants wanted the land for themselves, not later when defendants deeded the land to their corporate co-conspirator. It is noteworthy, however, that the point at which the court saw the conspiracy as ending was when title to the land

passed. The Court asked: "But were [the overt acts] done to effect the object of the conspiracy; that is to defraud the United States of the possession and title?", id. at 479, and concluded, "[t]he object of the conspiracy was effected when the title passed from the United States, ..." id. at 481. By that reasoning the conspiracy here did not end until the timber was cut, at which time possession and title to the timber passed to Walker as per the agreement of sale. Walker's reliance on Rose v. St. Clair, 28 F.2d 189 (W.D. Va. 1928), is even more misplaced. The court in Rose held a conspiracy to violate the statute forbidding interstate transport of prize fight films for exhibition ended with the completion of the illegal act itself, which was the crossing of state lines, and did not continue through the

exhibition, which was not expressly outlawed. Id. at 192. The court distinguished the illegal object of the conspiracy, the transport, from its ultimate purpose, the exhibition, finding the latter was not encompassed within the conspiracy. Id. at 191. That holding, even if still viable,[8] is not persuasive here, since here the illegal object of defrauding the government was not accomplished until all the timber had been cut and paid for at a noncompetitive price.

Several decisions by this court are more on point. A conspiracy to defraud

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8. The court in Rose found that Congress did not intend to outlaw exhibition of prize fight films and, even had such been its purpose, had "doubt as to the constitutional power of Congress to forbid the public exhibition of pictures of prize fights in the states. . .", even after they had traveled in interstate commerce. Id. at 192.

the United States by means of collusive bids on a contract to supply coal to the Army lasted past the award to defendants, continuing at least until the defendants cashed the government's checks. Houston v. United States, 217 F. 852, 859 (9th Cir. 1914), cert. denied, 238 U.S. 613, 35 S.Ct. 284, 59 L.Ed. 1490 (1915). "The bids were but a portion of the means whereby the unlawful purpose was to be accomplished. The indictment charges, not that the object of the conspiracy was to interpose collusive and fraudulent bids, but that it was to defraud the United States of the money that should be paid as the purchase price of coal." Id. at 856. In the instant case, the government as seller was not paid by Walker until well within the statutory period, and therefore those payments are part of the conspiracy under the

reasoning in Houston. Similarly, a securities fraud conspiracy continued beyond the sale of land contracts to investors and included the mailing of the last monthly payment check because those payments represented an integral part of the fraudulent transaction as an attempt to lull investors. United States v. Brown, 578 F.2d 1280, 1285 (9th Cir.), cert. denied, 439 U.S. 928, 99 S.Ct. 315, 58 L.Ed.2d 322 (1978). In determining the duration of a conspiracy for the purpose of admitting statements of co-conspirators, this court determined that the division of the profits was part of a conspiracy to rob a bank, given that the disposal of the fruits of the robbery would be one of the logical objectives of such a conspiracy.[9] Atkins v. United

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9. The court's alternative theory was that knowingly concealing stolen

States, 307 F.2d 937, 940 (9th Cir. 1962). This court wrote, "The criminal aim of the conspiracy was not to commit the robbery, but to make a profit by illegal means." Id. (Admissibility of co-conspirator's statements). Accord, United States v. James, 494 F.2d 1007, 1026 (D.C. Cir.), cert. denied, 419 U.S. 1020, 95 S.Ct. 495, 42 L.Ed.2d 294 (1974) (Threatening statement made by "collection agent" for seller to delinquent narcotics purchaser was admissible because obtaining illegal gain was normally one object of such a conspiracy).

Several courts have held that conspiracies can last beyond the attaining of their major objective to the

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money was also a criminal action itself, as well as an overt act forming an integral part of a conspiracy to rob a bank.

achievement of other subsidiary objectives afterward. For example, the Seventh Circuit has written:

> But the fact that the "central objective" of the conspiracy has been nominally attained does not preclude the continuance of the conspiracy. Where there is evidence that the conspirators originally agreed to take certain steps after the principal objective of the conspiracy was reached, or evidence from which such an agreement may reasonably be inferred, the conspiracy may be found to continue.

United States v. Hickey, 360 F.2d 127, 141 (7th Cir.), cert. denied, 385 U.S. 928, 87 S.Ct. 284, 17 L.Ed.2d 210 (1966), (citing Atkins, supra). See also Koury v. United States, 217 F.2d 387, 388 (6th Cir. 1954) ("A conspiracy is not ended by the illegal transportation of a stolen car when the fruits of the transportation are yet to be obtained and divided by the conspirators."); McDonald v. United States, 89 F.2d 128 (8th Cir.),

cert. denied 301 U.S. 697, 57 S.Ct. 925, 81 L.Ed. 1352 (1937) (Kidnapping agreement comprehended division of ransom money in spendable form; therefore, the act of exchanging marked money for unmarked was part of conspiracy). Thus, even if the central objective of the conspiracy in this case was to get the award, if the conspirators also planned to divide the profits, the conspiracy lasted until that additional objective was accomplished. That seems to be one of the theories applied in United States v. Inryco, Inc., 642 F.2d 290 (9th Cir. 1981), in which this court held that a Sherman §1 bid-rigging conspiracy could embrace not just the principal award but the later subcontracting awards as payoff to the subcontractor for refraining from bidding on the overall contract. The district court's analogy to a bank

robbery was rejected. The indictment should not have been dismissed as time-barred because a jury could infer that one of the additional objectives of the conspiracy was to give the subcontractor a noncompetitive advantage in the subcontract market by prearranging awards to him. The court's opinion was based in part on the anticompetitive nature of the subcontracting awards themselves; it stated that any act in furtherance of the agreement that tended to suppress or restrain trade would extend the time period. Walker would read that to mean that only later anti-competitive acts could have extended the conspiracy at issue in this case, but his reasoning is faulty in two respects. First, the court had other reasons for finding the subcontracting award was a payoff and part of the conspiracy: among

other things, it furthered the goals of the conspiracy and only occurred after the main award was made, both of which also apply here. Second, if the later acts in Inryco furthered a restraint-of-trade conspiracy because they tended to suppress trade, so by analogy later actions here extended a §371 defrauding conspiracy to the extent that they tended to defraud the government. Cutting the timber and paying the Forest Service an anticompetitive price are acts that tend to defraud the government and thus form part and parcel of a §371 conspiracy.

In sum, under all of the theories for measuring the duration of a conspiracy, the one at issue here lasted well past the award to Walker on June 23, 1972, and therefore the charge against him was not time-barred.

MULTIPLICITY

Walker's second assignment of error is that the indictment charging him with both conspiracy to restrain trade and conspiracy to defraud the United States was multiplicious because both counts were based on the same conspiratorial bid-rigging agreement, even though the agreement was to violate several statutes. He admits that a defendant can only complain of multiplicity if he is thereby prejudiced, such as by receiving consecutive sentences for multiplicious charges.[10] United States v. Davis, 548 F.2d 840, 845 (9th Cir. 1977). But he contends that the use of the two conspiracy counts here for one bid-rigging agreement prejudiced

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10. Since Walker was acquitted of the Sherman §1 count and convicted of the §371 fraud count, he received only one sentence.

him by either confusing the jury into an inconsistent verdict or encouraging them to reach a compromise verdict. A jury, however, is permitted to reach an inconsistent verdict. Dunn v. United States, 284 U.S. 390, 393 52 S.Ct. 189, 190, 76 L.Ed 356 (1932). But the issue of prejudice need not even be reached because the indictment was not multiplicious.

The starting point for determining if a single act constitutes two offenses, which is within the power of Congress to ordain, is whether each requires proof of a fact that the other does not, the test of statutory construction set out in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).[11] Under that test, Sherman §1

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11. This test had been used earlier, e.g., Gavieres v. United States, 220

conspiracy and §371 fraud conspiracy are two separate offenses. Walker's claim that the only distinction between the two is that the former requires a connection with interstate commerce, a purely jurisdictional requirement, is not correct. An overt act is required for a §371 conviction, United States v. Del

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U.S. 338, 342-43, 31 S.Ct. 421, 422, 55 L.Ed. 489 (1911), but it is usually called the Blockburger test. Walker claims that this "same evidence" test is too narrow for judging the multiplicity of conspiracy charges, calling our attention to United States v. Castro, 629 F.2d 456, 461 (7th Cir. 1980), which looked beyond the test to other factors for narcotics conspiracy charges. However, Castro was decided before the recent Supreme Court decision in Albernaz v. United States, ___ U.S. ____, 101 S.Ct 1137, 67 L.Ed 2d 275 (1981), which looked to whether each statute required the "same evidence" and whether Congress intended to protect against separate social evils with two conspiracy statutes, the two-part analysis we apply here.

Toro, 513 F.2d 656, 664 (2d Cir.), cert. denied, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975), but not for a Sherman §1 violation, Leyvas v. United States, 371 F.2d 714, 717 n. 14 (9th Cir. 1967). See generally Mowery v. Standard Oil Co. of Ohio, 463 F.Supp. 762, 765-66 (N.D. Ohio 1976), aff'd, 590 F.2d 335 (6th Cir. 1978)(elements of a Sherman §1 conspiracy); Del Toro, supra, 513 F.2d at 663-64 (elements of a §371 fraud conspiracy). The two statutes, besides requiring proof of a fact that the other does not, "serve separate and distinct purposes." United States v. Stearns, 550 F.2d 1167, 1172 (9th Cir. 1977). Sherman §1 is aimed at avoiding collusive activity to restrain trade; the United States need not be the victim. In contrast, §371 forbids fraud practiced against any federal government agency.

Because the essence of one offense is anti-competitive activity and of the other, deceptive acts,[12] each of which "impose[s] diverse social harms," Albernaz v. United States, ____ U.S. __ , ___, 101 S.Ct. 1137, 1144, 67 L.Ed.2d 275 (1981), we conclude that the two charges are not multiplicious.

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12. Walker's protest is similar to that made unsuccessfully, in United States v. Azzarelli, 612 F.2d 292 (7th Cir. 1979), cert. denied, 447 U.S. 920, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980). The Seventh Circuit upheld convictions for anti-trust conspiracy and mail fraud based, as was Walker's on bid-rigging and false statements of no price collusion. That court held that bid-rigging conduct was not only anti-competitive but also fraudulent, and thus could violate statutes forbidding each type of conduct. Id. at 298. The facts and the two social ills attacked by the statutes are almost identical to those here; the only difference is Azzarelli involved one conspiracy and one substantive offense and this case deals with two conspiracies.

As in Albernaz, our conclusion as to congressional intent "is reinforced by the fact that the two conspiracy statutes are directed to separate evils." Id.

Walker argues, however, that Blockburger is not applicable to multiple conspiracy charges based on the same agreement, which he sees as governed by Braverman v. United States, 317 U.S. 49, 63 S.Ct. 99, 87 L.Ed 23 (1942). In Braverman the defendant was charged under the general conspiracy portion of §371 - which forbids conspiracy "to commit any offense against the United States" - of conspiring to violate several Internal Revenue Code provisions. The Court held that one agreement, even though to violate several statutes, does not constitute more than one offense. Id. at 52-54, 63 S.Ct. at 101-104. "The single agreement is the prohibited conspiracy,

and however diverse its objects it violates but a single statute, §37 of the Criminal Code [now 18 U.S.C. §371]. For such a violation, only the single penalty prescribed by the statute can be imposed." Id. at 54, 63 S.Ct at 102. Where one agreement violates both the §371 general conspiracy statute forbidding the same general conduct, the prohibition on multiplicity equally applies. United States v. Mori, 444 F.2d 240, 244-45 (5th Cir.), cert. denied, 404 U.S. 913, 92 S.Ct. 238, 30 L.Ed.2d 187 (1971). This court adopted that view in United States v. Marotta, 518 F.2d 681, 684 (9th Cir. 1975): "We adhere to the reasoning in Mori in so far as it holds that where specific conspiracy statutes have been enacted, Congress intended to replace and not supplement the general

conspiracy statute."[13] The situation is different where, as in Marotta, a defendant violates "two specific conspiracy statutes." Id. (Upholding convictions for conspiracy to import marijuana and conspiracy to distribute marijuana).[14] The result in Marotta

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13. See also United States v. Rose, 570 F.2d 1358, 1362-63 (9th Cir. 1978). (Multiplicious to sentence defendant consecutively for both making a false statement, in violation of 18 U.S.C. §1001, and importing merchandise into the United States by means of a false statement, forbidden by 18 U.S.C. §542, where both were based on a single false statement to customs officials that defendant only had two cameras to declare).

14. The Fifth Circuit followed Marotta's interpretation of those two statutes, United States v. Houltin, 525 F.2d 943, 951 (5th Cir. 1976), vacated on other grounds and cert. denied on that ground, 429 U.S. 1034, 97 S.Ct. 725, 50 L.Ed.2d 745 (1977), a holding recently made by the Supreme Court, Albernaz, supra. See also United States v. James, 494 F.2d 1007, 1025-26 (D.C. Cir.), cert. denied, 419 U.S. 1020, 95

was explained: "Granting that appellant was engaged in a single conspiracy with dual criminal objects, this court finds that Congress fully intended to permit punishing such conspiracies twice as severely as those which embraced only one of the specified criminal objects." Id. at 685. The holding in Marotta was in line with the distinction drawn by the Supreme Court earlier in Braverman, supra, 317 U.S. at 54, 63 S.Ct. at 102, and reaffirmed in American Tobacco Co. v. United States, 328 U.S. 781, 787-88, 66 S.Ct. 1125, 1128, 90 L.Ed 1575 (1946), that multiplicity would not be found

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S.Ct. 495, 42 L.Ed.2d 294 (1974) (Convictions for conspiracy to receive and conceal narcotics and conspiracy to sell narcotics upheld); see generally, Gore v. United States, 357 U.S. 386, 390-91, 78 S.Ct. 1280, 1283, 2 L.Ed.2d 1405 (1958).

where a single agreement violated two separate and distinct conspiracy statutes. American Tobacco upheld convictions for conspiracy to restrain trade, Sherman §1, and conspiracy to monopolize trade, §2 Sherman, though both were based on a single conspiratorial agreement.

Walker insists that the results in Marotta and American Tobacco are not applicable here because he was not charged under two specific conspiracy statutes but rather one specific statute. Sherman §1, and a broad conspiracy statute, §371. However his analogy to the forbidden double use of the general conspiracy clause in §371 and a specific conspiracy statute outlawing the same conduct, relying on Marotta and Mori, is inapposite. Defendant in Mori was charged under the statute forbidding

conspiracy to import narcotics and also under the §371 general clause with conspiracy to violate a federal law, to-wit, that forbidding the importation of narcotics. Mori's indictment was clearly multiplicious. But Walker was not charged with Sherman §1 conspiracy and §371 conspiracy to violate a federal statute, to-wit, that forbidding the restraint of trade. Instead he was indicted under another clause of §371: not the general conspiracy clause involved in Mori but a separate clause forbidding defrauding the government. True, the defrauding clause is also broad and indictments for §371 defrauding should be carefully scrutinized to avoid overbroad application. Dennis v. United States, 384 U.S. 855, 860, 86 S.Ct. 1840, 1843, 16 L.Ed.2d 973 (1966); United States v. Shoup, 608 F.2d 950, 955-56 (3d

Cir. 1979); United States v. Rosenblatt, 554 F.2d 36, 40 (2nd Cir. 1977). In our opinion, however, the agreement here, as in Dennis, fit within the conduct proscribed by §371 as defrauding the United States and it was not multiplicious to charge both §371 fraud on the government and Sherman §1 restraint of trade, as they represented distinct offenses, which Congress meant to punish separately.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	No. 79-1738
	)	
vs.	)	ORDER
	)	
GEORGE E. WALKER,	)	
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court for the District of Oregon.
Honorable Robert C. Belloni, District Judge, Presiding.
Argued and Submitted on September 3, 1980
Before: ALARCON and CANBY, Circuit Judges and HOFFMAN*, District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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* Honorable Walter E. Hoffman, Senior Judge, United States District for the Eastern District of Virginia, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for a Writ of certiorari to the Court of Appeals for the Ninth Circuit on the counsel for respondent by enclosing three copies thereof in an envelope, postage prepaid, addressed to:

The Solictor General of the
United States
Department of Justice
Washington, D.C. 20530

and depositing the same in the United States mails at Portland, Oregon, on October 29, 1981, and further certify that all parties required to be served have been served.

Norman Sepenuk
Of Attorneys for Petitioner

Opposition

Office of the U.S.
FILED
DEC 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-812

In the Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE E. WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that petitioner's conviction for conspiracy to defraud the government was not barred by the statute of limitations when the government charged and proved various acts in furtherance of the conspiracy that occurred within the statutory period.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Atkins v. *United States*, 307 F. 2d 937 6

Berenyi v. *Immigration Director*, 385 U.S. 630 7

Fiswick v. *United States*, 329 U.S. 211 7

Grunewald v. *United States*, 353 U.S. 391 ..... 4, 5, 6, 7, 8

Haas v. *Henkle*, 216 U.S. 462 8

Hammerschmidt v. *United States*, 265 U.S. 182 8

Houston v. *United States*, 217 F. 2d 852, cert. denied, 238 U.S. 613 ..... 6, 8

Hyde v. *Shine*, 199 U.S. 62 8

IBEW v. *Foust*, 442 U.S. 42 7

Koury v. *United States*, 217 F. 2d 387 6

McDonald v. *United States*, 89 F. 2d 128, cert. denied, 301 U.S. 697 6

Toussie v. *United States*, 397 U.S. 112 7

United States v. *Hare*, 618 F. 2d 1085 7

Page

Cases—Continued:

United States v. *Iacovetti*, 466 F. 2d 1147, cert. denied, 410 U.S. 908 6

United States v. *Inryco*, 642 F. 2d 290, petition and cross-petition for cert. pending, Nos. 81-884 and 81-1099 (filed Nov. 12, 1981, and Dec. 11, 1981) 5, 6

United States v. *Johnston*, 268 U.S. 220 7

United States v. *Kissel*, 218 U.S. 601 7

United States v. *Knuckles*, 581 F. 2d 305 6

United States v. *Reynolds*, 511 F. 2d 603 6

United States v. *Rowe*, 56 F. 2d 747, cert. denied, 286 U.S. 554 6

Statutes:

Sherman Act, 15 U.S.C. 1 1

18 U.S.C. 201(g) 7

18 U.S.C. 371 ..... 2, 7, 8

18 U.S.C. 1341 2

18 U.S.C. 3282 4

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-812

GEORGE E. WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A44) is reported at 653 F. 2d 1343.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1981. A petition for rehearing was denied on October 15, 1981. The petition for a writ of certiorari was filed on October 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In January 1979, a grand jury sitting in Oregon returned an indictment charging petitioner Walker and his co-conspirator, James A. Smejkal, with conspiring to restrain trade in violation of the Sherman Act, 15 U.S.C. 1, and to

defraud the government in violation of 18 U.S.C. 371.[1] The conspiracy consisted of an agreement to allow petitioner to win the right to cut valuable timber on federal property, in return for which the other conspirators would be rewarded out of the inflated profits petitioner would earn after he harvested the timber and resold it. The indictment alleged that, as late as October 1975 and perhaps later, the conspirators logged and paid for the timber at an artificially depressed price and divided the profit among themselves. Following a seven-day trial, the jury acquitted petitioner of violating the Sherman Act, but convicted him of conspiring to defraud the government in violation of 18 U.S.C. 371.[2] Petitioner was sentenced to a 90-day term of imprisonment and a $10,000 fine (Pet. App. A1-A7).

1. The facts of this case are described fully in the opinion of the court of appeals (Pet. App. A4-A7). The United States Forest Service offered to sell timber from two tracts of federal land in the Siskiyou National Forest in Oregon, pursuant to an auction held on June 23, 1972. Under the terms of the government's offering, the high bidder would be permitted to log and pay for the timber as late as December 31, 1976, for one tract, and until September 30, 1975, for the second. Government Trial Exhibits ("GX") 1001, 1002; Trial Transcript ("Tr.") 125-126. As a prerequisite to bidding on these sales, petitioner signed and submitted Certificates of Independent Price Determination declaring that he had not colluded on or discussed bids in an attempt to restrain trade and that he had not agreed to pay any other companies a fee or percentage contingent on winning the sale. Tr. 151-152.

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[1] In a third count that ultimately was severed and dismissed, petitioner was charged with mail fraud, 18 U.S.C. 1341, in connection with the same fraudulent scheme.

[2] Smejkal was acquitted on both counts.

Contrary to his representations, petitioner and several other bidders and potential bidders agreed to allow petitioner to purchase the timber at an artificially suppressed price and then divide the resulting inflated profits as the timber was logged and sold. In furtherance of the conspiracy, petitioner signed a contract three days prior to the auction in which he agreed to share the profits with his co-defendant Smejkal, agent for the Murphy Veneer Company. GX 1128, 1129. Petitioner arranged to have Smejkal paid directly by West Coast Orient Company, petitioner's principal purchaser. Tr. 195, 207-208; GX 1101-1106. Petitioner explained that these payments were in return for Smejkal's noncompetitive bids. Tr. 362. Petitioner also entered into a profit sharing agreement with West Coast Orient, which, like Smejkal, underbid petitioner on the Siskiyou sales. Tr. 191, 227; GX 1113. According to the terms of this agreement, petitioner and West Coast Orient agreed to divide equally the extra profit petitioner intended to earn on these sales. Tr. 192-200; GX 1113. Petitioner also conspired with Coos Head Timber Company, another company which underbid petitioner on these sales. To obviate the need for sending Coos Head payoff checks, petitioner rewarded Coos Head by selling it timber he logged from these sales at well below its worth. Tr. 153-154, 195, 197, 211. Petitioner's purchase notes falsely listed the difference between market and sales price as a "logging cost." Tr. 206-207. Petitioner also conspired with Ocean Terminals Co., a potential bidder who refrained from bidding on the sales. Petitioner arranged for Ocean Terminals to provide log handling services to West Coast Orient, his purchaser, at double the normal rate. When West Coast refused to pay the double rate, petitioner agreed to split the cost, although it is normally the purchaser's responsibility to obtain log handling services. Tr. 196-197, 277-281.

Petitioner's complicated division of his inflated profits to and through his co-conspirators occurred only as he logged, paid for and sold the Siskiyou timber; logging, payment and profit division continued until 1975, well within the relevant period under the statute of limitations, 18 U.S.C. 3282. GX 1001, 1002, 1101-1111.

2. The court of appeals unanimously affirmed petitioner's conviction. Since petitioner did not challenge the sufficiency of the evidence, the primary issue on appeal was whether the conviction was time barred.[3] The court of appeals applied to the facts in this case the legal test articulated in this Court's opinion in *Grunewald* v. *United States*, 353 U.S. 391 (1957). Thus, it looked to the scope of the conspiratorial agreement in order to determine "both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." 353 U.S. at 397; see Pet. App. A9. Applying this test, the court held that the conspiratorial agreement itself looked not merely to bid-rigging, but also to the ultimate objective of subsequently paying for the timber, reselling it and then dividing the excess profits. Pet. App. A14. The court rejected petitioner's argument that the government last suffered injury on the date the sales were awarded; instead it found that the government was defrauded, and thus injured, each time it was paid an artificially low price as the timber was removed (Pet. App. A16-A17):

> The injury, in our opinion, was not complete until Walker had cut the last timber, obtained title to it, paid the government a noncompetitive price for it, resold it at an excess profit, and split the excess with his co-conspirators. The very reason Walker was charged

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[3]Petitioner also challenged the indictment as multiplicitous. The court of appeals correctly rejected this argument (Pet. App. A44), and petitioner does not renew it in this Court.

> under the more all-encompassing defrauding statute, rather than for conspiracy to make false statement was that the injury went beyond the government's reliance on a false statement. He defrauded the United States of a competitive price for its timber each time he took the later actions.

The court rejected petitioner's contention that these actions were merely the result of the conspiracy whose main objectives were achieved at the time the bids were rigged and won. Instead, it found that "those acts formed part of the conspiracy because they did not follow the accomplishment of its central criminal objectives but rather were acts in *furtherance* of those aims, viz, obtaining and dividing the excess profits made on the timber." Pet. App. A21 (emphasis in original).

ARGUMENT

The decision of the court of appeals, on which we principally rely, is correct and does not conflict with any decision of this Court or any other courts of appeals. Accordingly, review by this Court is unwarranted.

1. Petitioner's contention (Pet. 8-18) that the decision below conflicts with prior decisions of this Court is without merit. The court of appeals expressly adopted (Pet. App. A9) the legal test set forth by this Court in *Grunewald* v. *United States, supra*, 353 U.S. at 397. Thus, for the purpose of determining whether overt acts in furtherance of the conspiracy occurred within the relevant period prescribed by the statute of limitations, the court of appeals ascertained the scope of the conspiratorial agreement by carefully analyzing the facts of this case.[4] As did the

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[4]As petitioner notes (Pet. 20-21 n.6), the Ninth Circuit's decision in *United States* v. *Inryco*, 642 F. 2d 290 (1981), is also pending before this Court on petition and cross-petition for certiorari, Nos. 81-884 and 81-1099 (filed Nov. 12, 1981, and Dec. 11, 1981). Both cases involve statute of limitations issues in criminal conspiracy cases, but there the

jury,[5] it found that the later acts of harvesting the timber, paying the government the artificially depressed price, and dividing the inflated profits among the conspirators were part of or in furtherance of the conspiracy.[6] Two courts

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similarities end. Here, petitioner argues that the actions taken to divide the profits, as a matter of law, were not overt acts done in furtherance of the objectives of the conspiratorial agreement. By contrast, the petitioner in *Inryco* claims that overt acts done in furtherance of the conspiratorial agreement do not stay the running of the statute of limitations unless such acts are themselves criminal. Accordingly, this case need not be held pending disposition of the petitions in *Inryco*.

[5]The duration of a conspiracy for statute of limitations purposes is a question of fact for the jury. *Grunewald* v. *United States*, *supra*, 353 U.S. at 408; see *Koury* v. *United States*, 217 F. 2d 387, 388 (6th Cir. 1954). The jury was properly instructed on the statute of limitations issue, and petitioner does not challenge the trial court's jury charge.

[6]The finding of the two lower courts comports with common sense. The co-conspirators were not paid immediately after the contract was awarded. Presumably, the delay in payment was due to the fact that petitioner would not obtain any profit from the bid-rigging until he was able to harvest and then resell the timber he purchased at an artificially depressed price. Since the co-conspirators were experienced in the business, it is only natural to assume that the manner in which they would be paid off in the future was part of the conspiratorial agreement. The complex means worked out to disguise the nature of the division of profits further supports the conclusion that the original conspiracy agreement contemplated continuing cooperation by its members through various overt acts performed within the statutory period.

As the courts of appeals (including the Ninth Circuit) have long recognized, criminal conspiracies aimed at making a profit generally comprehend a division of profits among the conspirators. *United States* v. *Reynolds*, 511 F. 2d 603, 607 (5th Cir. 1975); *United States* v. *Iacovetti*, 466 F. 2d 1147, 1153 (5th Cir. 1972), cert. denied, 410 U.S. 908 (1973); *Atkins* v. *United States*, 307 F. 2d 937, 940 (9th Cir. 1962); *Koury* v. *United States*, 217 F. 2d 387 (6th Cir. 1954); *McDonald* v. *United States*, 89 F. 2d 128, 133-135 (8th Cir.), cert. denied, 301 U.S. 697 (1937); *United States* v. *Rowe*, 56 F. 2d 747, 751 (2d Cir.), cert. denied, 286 U.S. 554 (1932); *Houston* v. *United States*, 217 F. 852, 859 (9th Cir. 1914), cert. denied, 238 U.S. 613 (1915). The Second Circuit has raised this common sense proposition to a rule of law. *United States* v. *Knuckles*, 581 F. 2d 305, 313 (1978).

have found against petitioner on his factual claim. There is no need for this Court to review this factual determination, which is limited to the particular record in this case. *IBEW* v. *Foust*, 442 U.S. 42, 46 n.7 (1979); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).[7]

2. Petitioner's assertion (Pet. 21-25) that certiorari is warranted to clarify the proper scope of 18 U.S.C. 371 is both vague and beside the mark. In view of the facts of this case, there is nothing unclear or unfair in applying that statute and finding a conspiracy to defraud the government. As the court of appeals correctly noted, petitioner was charged under the statute because his bid-rigging scheme artificially reduced the sums paid to the government as the

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[7]Contrary to petitioner's suggestion (Pet. 14-15), the decision of the court of appeals does not conflict with either *United States* v. *Kissel*, 218 U.S. 601 (1910), or *Fiswick* v. *United States*, 329 U.S. 211 (1946). In the case at hand, there was no attempt to prove that a conspiracy continued to have an illegal result in the absence of overt acts within the statutory period. Instead, the evidence showed numerous actions by petitioner associated with the initial illegal conduct, and the only question was whether those later actions were in furtherance of the original conspiratorial agreement.

Petitioner's reliance on *Toussie* v. *United States*, 397 U.S. 112 (1970) (Pet. 10-13), and *United States* v. *Hare*, 618 F. 2d 1085 (4th Cir. 1980) (Pet. 18-21), similarly is misplaced. Those cases did not deal with the question of the duration of conspiracies. *Toussie* dealt with the issue whether failing to register for the draft is a continuing offense. In holding that it was not, this Court explicitly distinguished the continuing nature of certain substantive offenses from a conspiracy, "which the Court has held continues as long as the conspirators engage in overt acts in furtherance of their plot." 397 U.S. at 122, citing *Grunewald* and *Kissel*. The *Hare* case followed *Toussie* in finding that the crime of receiving anything of value for performing an official act, 18 U.S.C. 201(g), is not a continuing one. Neither case questions this Court's holding in *Kissel* and *Grunewald* that a criminal conspiracy continues until its objects are achieved. In a criminal conspiracy case, it is the scope of the conspiratorial agreement, not the nature of the crime, which is determinative of the statute of limitations issue.

timber periodically was removed from the land and thus defrauded the United States of a higher, competitive price for its timber. Pet. App. A16-A17. Since these actions fall clearly within the broad scope of 18 U.S.C. 371,[8] this case raises no substantial issue as to the scope of the statute that requires review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1981

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[8]See *Houston* v. *United States*, 217 F. 852, 855-856 (9th Cir. 1914), cert. denied, 238 U.S. 613 (1915); see also *Grunewald* v. *United States*, 353 U.S. 391, 404 (1957); *Hammerschmidt* v. *United States*, 265 U.S. 182, 188 (1924); *Haas* v. *Henkle*, 216 U.S. 462, 479-480 (1910); *Hyde* v. *Shine*, 199 U.S. 62, 81 (1905).

DOJ-1981-12